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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 490

AMERICAN LECITHIN COMPANY, INC., PETITIONER

v.

PAUL V. McNUTT, AS FEDERAL SECURITY ADMINISTRATOR OF THE UNITED STATES [1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE ADMINISTRATOR IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 207–209) is reported at 155 F. 2d 784.

[1] Paul V. McNutt was the Federal Security Administrator at the time this action was instituted under Section 701 (f) (1) of the Federal Food, Drug, and Cosmetic Act (*infra*, p. 3). No question of abatement of the action by reason of the fact that he no longer holds that office is involved, however, in view of the provision of Section 701 (f) (5) of the Act (21 U. S. C. 371 (f) (5)) that "Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office."

JURISDICTION

The judgment of the circuit court of appeals was entered June 14, 1946 (R. 210). The petition for a writ of certiorari was filed September 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner was "adversely affected" by the Administrator's order and presented in its petition for review of the order "a case of actual controversy" within the meaning of Section 701 (f) (1) of the Federal Food, Drug, and Cosmetic Act, so as to give the court below jurisdiction to entertain the petition.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, provides in pertinent part:

> SEC. 401 [21 U. S. C. 341]. Whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: * * *. In prescribing a defini-

tion and standard of identity for any food or class of food in which optional ingredients are permitted, the Administrator shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. * * *

SEC. 701 (e) [21 U. S. C. 371 (e)]. The Administrator, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor, shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by any of the following sections of this Act: 401 * * *. At the hearing any interested person may be heard in person or by his representative. As soon as practicable after completion of the hearing, the Administrator shall by order make public his action in issuing, amending, or repealing the regulation or determining not to take such action. The Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based. * * *

SEC. 701 (f) (1) [21 U. S. C. 371 (f) (1)]. In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may * * * file a petition with the Circuit Court of Appeals of the United

States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order.

SEC. 701 (f) (3) [21 U. S. C. 371 (f) (3)]. The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. * * * The findings of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive.

STATEMENT

On December 4, 1944, following hearings held pursuant to Section 701(e) of the Federal Food, Drug, and Cosmetic Act (R. 38–147, 155–191), public notice of which was given (R. 30–37), and in which petitioner participated (see R. 41, 43, 53, 57, 62, 65–101, etc.), the Administrator issued an order, which was published in the Federal Register on December 6, 1944 (9 Fed. Reg. 14329), establishing definitions and standards of identity for cacao products, pursuant to Section 401 of the Act (R. 151–151H). The order permits the use of lecithin as an optional ingredient in chocolate and chocolate coating (Regulations, §§ 14.6 (a) (3) and 14.7 (e) (3)), but requires that, when lecithin is so used, the label bear the statement "Emulsifier Added" or "With Added Emulsifier" (Regulations, §§ 14.6 (e) (2) and 14.7 (c) (2)) (R. 151 F, 151 G). The Administrator's findings of fact, on which the foregoing regulations were based, may be summarized as follows: Uniformity of viscosity

is important in chocolate coating in order to insure the uniformity of thickness of covering demanded by confectioners (Finding No. 49); the viscosity of different batches of chocolate can be held within a narrow range by the use of small quantities of an emulsifying ingredient, and lecithin is suitable for use as such an ingredient (Finding No. 50); incident to its desired effect of maintaining uniform viscosity of coating, the use of an emulsifier makes it possible to obtain a given viscosity with less cacao fat than would otherwise be required, and since coatings containing emulsifiers may contain lesser quantities of cacao fat than a chocolate of similar viscosity which does not contain emulsifiers, it is in the consumer's interest to know when emulsifiers are present (Finding No. 52); and since the specific names of the emulsifiers used are not familiar to most consumers (see R. 163–183, 195–206), but are generally referred to by their collective common name "emulsifiers," the label statement "Emulsifier Added" or "With Added Emulsifier" is an informative and appropriate statement of the presence of such ingredients (Finding No. 53). See also Finding No. 58. (R. 151 C.)

Evidence was adduced at the hearings that lecithin is an emulsifier and stabilizer, used by chocolate manufacturers to adjust the viscosity of chocolate products and permit an even spread of chocolate coating to candy, ice cream, etc. (R. 49, 50, 66, 67, 73, 76, 89, 90, 107, 163, 183, 184).

On February 8, 1945, petitioner filed in the Circuit Court of Appeals for the Second Circuit a petition for judicial review of the Administrator's order, praying that it be set aside in so far as it requires the use of the label statement "Emulsifier Added" or "With Added Emulsifier" for the optional ingredient lecithin, and in so far as it prohibits the use of the specific word "lecithin" as the label identification of petitioner's product when used as an optional ingredient in cacao products (see R. 207, 208). The circuit court of appeals held that petitioner was not "adversely affected" by the order and did not present "a case of actual controversy" as to the validity of the order, as required by Section 701 (f) (1) of the Act, *supra,* p. 3, and accordingly dismissed the petition for lack of jurisdiction. The court observed in its opinion that petitioner was not a member of, and did not represent, the cacao products industry; that the order did not touch the manner in which petitioner's business should be conducted and petitioner could still sell its product under the name "lecithin," the label requirements of the order being directed only to its customers; that even as to petitioner's customers, the order did not, as petitioner's prayer for relief erroneously assumed, prohibit them from using the word "lecithin" on their labels, provided they observed the prescribed label declaration—that is to say, petitioner's customers might, if they wished, and as respondent expressly conceded, use

a label statement reading "Emulsifier Lecithin Added" or "With Added Emulsifier Lecithin"; that inasmuch as petitioner's customers were privileged at their option to use or not use the word "lecithin" on their labels, if they did not use it it would be their election, not the terms of the order, which would deprive petitioner of any advertising or competitive advantage which might be gained from having the labels carry the word "lecithin"; and that petitioner could not be damaged by the addition of the word "emulsifier" as descriptive of lecithin, since the findings of fact made by the Administrator state that emulsifiers are commonly added to chocolate, and that lecithin and other substances are suitable for use as such emulsifying ingredients. (R. 208–209.)

ARGUMENT

The sole question before this Court is whether petitioner was "adversely affected" by the Administrator's order and presented in its petition for review "a case of actual controversy" within the meaning of Section 701 (f) (1) of the Federal Food, Drug, and Cosmetic Act. We submit that the court below was clearly correct in answering this question in the negative and, accordingly, dismissing the petition for lack of jurisdiction.

Petitioner is not a member of, nor does it represent, the cacao products industry. Its sole connection with that industry is that some chocolate

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manufacturers purchase petitioner's product, lecithin, for use as an emulsifying ingredient in chocolate products (See R. 207–208). The Administrator's order does not in any manner restrict the sale of petitioner's product. It expressly permits the use of lecithin as an optional ingredient in chocolate, provided its presence is indicated by a statement on the label that an "emulsifier" has been added. If petitioner is affected by the order, it is because chocolate manufacturers who use lecithin in their products need not, under the order, specify the type of emulsifier used. They may, but they need not, whence arises the nub of petitioner's complaint: "it is obvious that few, if any, users of lecithin will go beyond the minimum requirements of the order in their labeling provisions. Thus, * * * the order * * * does adversely affect petitioner in the general use of the name of its product. Petitioner's good will, built up at great expense and over a substantial period of time, is thus directly jeopardized" (Pet. 14). Petitioner's real complaint, therefore, is seen to lie in the fact that the order, by failing to require the name of the specific type of emulsifier used to be declared on the label, may subject petitioner to increased competition with other producers of emulsifying agents used in chocolate products.

This Court has held, however, that injury sustained merely through the operation of competition does not confer standing to challenge gov-

ernmental action favorable to a competitor. *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 139–140; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479–483; *Sprunt & Son* v. *United States*, 281 U. S. 249, 254–257; *Edward Hines Trustees* v. *United States*, 263 U. S. 143. *Commission* v. *Sanders Radio Station*, 309 U. S. 470, cited by petitioner (Pet. 14), is distinguishable on grounds succinctly stated by this Court (pp. 476–477). *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. C. A. 2), order vacated, 320 U. S. 707, also cited by petitioner (Pet. 14), is likewise clearly distinguishable. It was there held that *consumers*, threatened with the prospect of forthwith having to pay higher prices for coal as the result of the order under review, were "persons aggrieved" by the order so as to have standing to sue. The court was careful to point out, however, that even "financial loss resulting from increased lawful competition with a plaintiff, made possible solely by the defendant official's unlawful action, is insufficient to create a justiciable controversy" (p. 701), citing the *Alabama Power Co.* and *Tennessee Power Co.* cases, *supra*.

Petitioner urges, however (Pet. 12–13), that the decision below is in conflict with *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture*, 120 F. 2d 258 (C. C. A. 7), and *Land O'Lakes Creameries* v. *McNutt*, 132 F. 2d 653 (C. C. A. 8). In the *Staley Mfg. Co.* case, an order establishing a

definition and standard of identity for sweetened condensed milk permitted the use of refined sugar or a combination of refined sugar and refined corn sugar as sweetening ingredients, but did not permit the use of corn syrup. Since the effect of the order was to prevent makers of sweetened condensed milk from using corn syrup as a sweetener, and since corn syrup producers were thus deprived of the opportunity to compete in that field with other producers of sweetening ingredients, it was held that a corn syrup manufacturer had standing to challenge the order. In the *Land O'Lakes Creameries* case, an order establishing a definition and standard of identity for oleomargarine permitted the use of sodium benzoate, Vitamin A, and diacetyl as optional ingredients. Butter producers petitioned for review of the order, alleging that its effect was adverse to their interests as competitors of the oleomargarine industry in that the right to include the named optional ingredients permitted oleomargarine more nearly to simulate butter, thereby tending to deceive the consumer. The court, "with some misgivings" (p. 658), resolved in the petitioners' favor its doubts with respect to their standing to challenge the order.

But petitioner in the instant proceeding goes much further than the petitioners in the two cases just discussed. Although the regulations do not prevent or hamper petitioner's sales in any re-

spect, as in the *Staley Mfg. Co.* case, and do not establish a definition and standard of identity for any product which is in competition with its product, as in the *Land O'Lakes Creameries* case, petitioner claims that it is adversely affected thereby and that a case of actual controversy exists. We submit, however, that petitioner is not adversely affected within the meaning of the statute. Petitioner is free to continue to sell its product to its customers as lecithin, and its customers are free to use it as an optional ingredient in their products. Nothing in the regulations prevents its customers from stating on their labels, if they so desire, that they have used lecithin.[2]

[2] Petitioner complains that the court below "ousted itself of jurisdiction upon a construction of the order dehors the record * * * without public announcement and by mere statement in the Government's brief and argument before the Court" (Pet. 5; see also Pet. 4, 9, 10–11). Petitioner has reference to a statement in the Administrator's brief below that "Nothing in the regulations prevents its [petitioner's] customers from stating on their labels, if they so desire, that they have used lecithin." While the court below alluded to this as a "reasonable construction by the Administrator of his own order" (R. 208), we do not think the statement in the Administrator's brief is a "construction" in the sense of a clarification of something doubtful or ambiguous, but simply a statement of what was already plain without construction. In any event, we do not perceive how the asserted "construction" could have been calculated to undermine petitioner's standing to challenge the order as a person "adversely affected" by it, as petitioner suggests (see Pet. 5), since the gist of petitioner's challenge of the order is not that its customers are not *permitted* to specify that lecithin is the emulsifying agent used in their products, but that they are not *required* to do so.

Petitioner's customers may continue to purchase its product as lecithin just as they did prior to the issuance of the regulations. Manufacturers of cacao products may also choose to purchase and use products which are in competition with petitioner's product, but this they could also do before the issuance of the regulations. So far as the record shows, the sole effect of the regulations on petitioner is that, conceivably, manufacturers who, prior to the issuance of the regulations, felt constrained to purchase lecithin exclusively because otherwise they would be required to keep on hand supplies of different labels describing each optional emulsifying agent (see R. 60–61, 122, 185–186), now no longer need feel such constraint. It seems clear, however, that this effect of the regulations is not "of sufficient immediacy and reality" to make out a "substantial controversy" (*Md. Casualty Co.* v. *Pacific Co.,* 312 U. S. 270, 273) or "something more than nominal or highly speculative" (*National Broadcasting Co.* v. *Federal Communications Com.,* 132 F. 2d 545, 548 (App. D. C.), affirmed, 319 U. S. 239).

A case more nearly in point than either the *Staley Mfg. Co.* or *Land O'Lakes Creameries* case is *United States Cane Sugar Refiners' Ass'n* v. *McNutt,* 138 F. 2d 116, also decided by the Circuit Court of Appeals for the Second Circuit. That case involved a petition by associations of sugar growers to review an order

fixing definitions and standards of identity for various canned fruits. The petitioners claimed they were adversely affected by reason of the fact that the regulations permitted the fruit canning industry to use as optional ingredients dextrose and corn syrup, which were in competition with the petitioners' product, without declaring that fact on the labels. It was held that the petitioners were not adversely affected within the meaning of Section 701 (f) (1) of the Act and the petition was dismissed for lack of jurisdiction. After reviewing the *Staley Mfg. Co.* and *Land O'Lakes Creameries* decisions, the court stated the reasons which it felt required dismissal of the petition in the following cogent language, which, we think, is equally applicable in the instant case (pp. 120–121):

> * * * It is inevitable that such regulations as these will affect in one way or another a large number of persons. In a sense they "affect" the public at large for whose benefit they are promulgated. It is to be expected that this effect may be thought to be "adverse" by a lesser, but still large number of persons not engaged in making or selling the standardized product. It is, however, inconceivable that Congress intended to permit all persons who could show a remote and uncertain likelihood that the regulations would injuriously affect the market for their produce to file petitions to review merely because they de-

cided that they had been, or might possibly be, put in danger of that. In order to prevent such obstruction to the orderly administration of the statute by virtually unlimited petitions to review, it is necessary that the class of petitioners who have "standing to sue" be confined to those who can show some direct adverse effect traceable with reasonable certainty to the regulations promulgated.

* * * The paramount need for the orderly and the reasonably expeditious administration of the statute by the official charged with the duty of making it effective in the public interest creates at least the need of limitations upon the construction of the term "adversely affected" to do away with delays that otherwise could be brought about by persons upon whom the adverse effect of the regulations would at most be so negligible that it should be disregarded to effectuate the public interest the statute was designed to promote.

* * * What the petitioners are really claiming is that the regulations will do away with the remote, speculative sales resistance of the public to the marketing of the canned fruits sweetened in some part with dextrose or corn sirup which might be present if the labels on the cans disclosed, by naming them, that the permitted amounts of one or the other or both of the optional sweeteners had been added to the required sugar. If such a tenuous likeli-

> hood of injury were enough to cause the petitioners to be "adversely affected," the opportunity for maintaining petitions to review such regulations as these would be so unlimited as to be a serious threat to the practical administration of the statute. * * *

In the instant case, the court below, after adverting to its holding that any adverse effect of the order involved in the *Cane Sugar* case was "too remote and indirect to give the petitioner standing to review the order," remarked that "In the case at bar the damage is even more speculative than in the *Cane Sugar* case, for it will turn on whether or not the petitioner's customers elect to mention lecithin as the emulsifier they have added" (R. 209).

Assuming that the *Staley Mfg. Co.* and *Land O'Lakes Creameries* cases were correctly decided, it is submitted that those cases should mark the outermost limits that courts should go in holding that a person or company is adversely affected by an order establishing definitions and standards of identity under the Federal Food, Drug, and Cosmetic Act. Indeed, the *Land O'Lakes Creameries* opinion recognizes that that case was a borderline one. The adverse effects of the orders on the petitioners in the *Cane Sugar* case and the instant case were, as we have shown, far more speculative and insubstantial than were the orders involved in those cases, and the court below was,

we submit, clearly right in dismissing the petitions in both cases for lack of jurisdiction.

If petitioner's theory as to who has standing to challenge an order establishing a definition and standard of identity under the Federal Food, Drug, and Cosmetic Act be correct, then any one who sells goods to members of the industry directly affected by the order may challenge it if his product, under the order, must be designated by a term which he dislikes or which generically includes his competitor's products. The consequences to which such a theory would lead show the basic unsoundness of the theory. The persons "affected" by an order of the Administrator in the remote sense of not liking the name by which the ingredient purveyed to the industry concerned must be designated are legion. For all persons as remotely affected as petitioner to be recognized as authorized to challenge the Administrator's order would invite a scramble to bring before the courts every conceivable situation where not only members of the industry affected, but every supplier of every ingredient sold to a member of the industry, preferred that its particular trade name be used to the exclusion of some more general term of description.

The number of potential ingredients which may be purveyed to members of an industry for whose product a definition and standard of identity may be prescribed is manifold, and the competitive

situation extremely complicated. In the instant case, for example, petitioner's product is only one of many similar products which are or may be used by members of the cacao products industry as optional ingredients. The Emulsol Corporation manufactures "Chovis" (R. 183); the W. A. Cleary Corporation manufactures lecithin (R. 189–190); the Chemical Novelties Corporation manufactures a number of lecithin products under the trade mark "Vejin" (R. 123); Refining, Inc. supplies lecithin for chocolate and other edible products (R. 144, 191); and Ross & Rowe, Inc. distributes "Yelkin," a standardized lecithin, for use in chocolate (R. 192). Each of these manufacturers is presumably as much interested in its product, its name, the advertising value of having its name designated on labels, and its good will, as petitioner. Petitioner itself sells lecithin under various names, such as "Lexin" and "Margo" (R. 192–194).

Nor do the complications involving these various trade names end the ramifications which would result from a holding that a producer of an ingredient sold to the industry concerned is "adversely affected" because he is dissatisfied with the manner in which his product must be described by members of the affected industry. "Lecithin" itself is a generic term covering a number of products (R. 145, 146, 150, 162–163). The W. A. Cleary Corporation and the Chemical

Novelties Corporation make "soy lecithin" or "soy bean lecithin," obtained from soy beans (R. 123–124, 189–190, 191). Presumably, they might feel themselves aggrieved if the regulations were to prescribe that their products be described on labels used by the cacao products industry merely as "lecithin" rather than, for example, "soy lecithin." The Chemical Novelties Corporation also manufactures "cocoa butter lecithin" (R. 191) (as does petitioner (R. 133–134)), which has a cocoa butter rather than a soy bean oil carrier (R. 141). The manufacturers of lecithin with a cocoa butter carrier might claim that the nature of the carrier in which the lecithin is contained should be described on the labels of manufacturers using the product.

It would not promote the purposes of the Act to smother the Administrator and the courts with a welter of conflicting claims having to do not with the promotion of consumer interest but with the maintenance or securing of some assumed commercial advantages by the many concerns supplying ingredients to an industry whose product has been defined and standardized. If these claims may be presented by everyone failing to secure such an advantage, the effectiveness of the Act may well be paralyzed, and courts confronted with what are primarily legislative considerations, to an extent Congress never could have contemplated. That this could have been the intent

of Congress with respect to a remedial statute such as the Federal Food, Drug, and Cosmetic Act, designed to protect the public health and pocketbook, is not to be presumed. Cf. *United States* v. *Dotterweich*, 320 U. S. 277, 280.

CONCLUSION

The decision below is clearly correct, and no real conflict of decisions is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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